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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 ALLEN F. CABIAO and ESTRELLA R.
7 CABIAO, husband and wife,

8 Plaintiffs,

9 v.

10 AURORA LOAN SERVICES, LLC and
11 CAL-WESTERN RECONVEYANCE
12 CORPORATION OF WASHINGTON,

Defendants.

CASE NO. C10-5833BHS

ORDER ON MOTIONS

13 This matter comes before the Court on Defendant Aurora Loan Services'
14 ("Aurora") motion to dismiss (Dkt. 37), Plaintiffs Allen and Estrella Cabiao's
15 ("Cabiaos") motion for leave to amend (Dkt. 43), and Aurora's motion to dismiss (Dkt.
16 47). The Court has considered the pleadings filed in support of and in opposition to the
17 motions and the remainder of the file and hereby grants the motion to dismiss and denies
18 the other motions as moot.

19 **I. PROCEDURAL HISTORY**

20 On November 15, 2010, the Cabiaos filed their initial complaint. Dkt. 1. On May
21 18, 2011, the Cabiaos filed an amended complaint. Dkt. 25.

22 On June 13, 2011, the Cabiaos filed a motion for leave to amend their complaint
23 and motion to extend the pretrial and trial deadlines. Dkt. 32.

24 On June 27, 2011, Aurora filed a motion to dismiss. Dkt. 37. On July 15, 2011,
25 Defendant Cal-Western Reconveyance Corporation of Washington ("Cal-Western")
26 joined Aurora's motion (Dkt. 41) and the Cabiaos responded (Dkt. 42).
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1 On July 14, 2011, the Court granted in part and denied in part the Cabiaos' motion
2 for leave to amend. Dkt. 39. The Court allowed the Cabiaos an opportunity to amend
3 their causes of action for violations of the Fair Debt Collection Practices Act ("FDCPA"),
4 15 U.S.C. § 1681, *et seq.*, and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681,
5 *et seq. Id.*

6 On July 29, 2011, the Cabiaos filed a motion for leave to file an amended
7 complaint (Dkt. 43) and filed a memorandum in support of the motion (Dkt. 44). On
8 August 12, 2011, Aurora responded. Dkt. 50. On August 18, 2011, the Cabiaos replied.
9 Dkt. 51.

10 On August 8, 2011, Aurora filed another motion to dismiss. Dkt. 47. On August
11 9, 2011, Cal-Western joined Aurora's motion. Dkt. 49. On August 26, 2011, the Cabiaos
12 responded. Dkt. 53. On September 2, 2011, Aurora replied. Dkt. 55.

14 II. FACTUAL BACKGROUND

15 The Cabiaos entered into a loan with Homecomings Financial, LLC
16 ("Homecomings") which was secured by the real property commonly known as 10911
17 209th Avenue East, Bonney Lake, Washington (the "Property"). The Deed of Trust was
18 recorded on April 25, 2007, under Pierce County Auditor's file no. 200704251560. *See*
19 Dkt. 38, Declaration of Devra Featheringill, Exh. A. The Deed of Trust identified
20 Homecomings as the Lender, Mortgage Electronic Registration Systems, Inc. ("MERS")
21 as the Beneficiary, and First American Title Company as the Trustee. *Id.*

22 On or around November 20, 2009, MERS, acting as the nominee for
23 Homecomings, assigned the Deed of Trust to Aurora. On or around December 17, 2009,
24 Aurora appointed Cal-Western as trustee. On January 12, 2010, the Assignment and the
25 Appointment of Successor Trustee were recorded under Pierce County Auditor's file nos.
26 201001120654 and 201001120655, respectively. *Id.*, Exh. B & C.

1 The Cabiaos failed to make payments on their loan, and were served with a Notice
2 of Trustee's Sale. The notice was recorded on February 2, 2010, under Pierce County
3 Auditor's file no. 201002020584. *Id.*, Exh. D. The sale was held on May 7, 2010, and
4 the Trustee's Deed was recorded on May 21, 2010, under Pierce County Auditor's file no.
5 201005210004. *Id.*, Exh. E. The Cabiaos did not seek an injunction or otherwise act to
6 halt the trustee's sale.

7 **III. DISCUSSION**

8 The Cabiaos have filed multiple complaints in this matter. Upon review of the file,
9 the Court need only consider Aurora's motion to dismiss the Cabiaos' most recent
10 complaint. The other pending motions (Dkts. 37 & 43) are denied as moot.

11 **A. Standard**

12 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
13 Procedure may be based on either the lack of a cognizable legal theory or the absence of
14 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901
15 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the
16 complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301
17 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed
18 factual allegations but must provide the grounds for entitlement to relief and not merely a
19 "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v.*
20 *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a
21 claim to relief that is plausible on its face." *Id.* at 1974.

22 **B. Aurora's Motion**

23 Although the Court granted the Cabiaos an opportunity to amend only their
24 FDCPA and FCRA claims, the Cabiaos have included causes of action for Invalid Debt
25 and Recoupment and Setoff under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*
26 Dkt. 43-1. Aurora moves to dismiss all four claims. Dkt. 47.

1 **1. Invalid Debt**

2 The Cabiaos appear to allege that their debt was somehow “invalid” because of an
3 improper assignment of the Note and Deed of Trust. Dkt. 43-1, ¶ 10. The Cabiaos,
4 however, fail to provide any factual allegations to support this claim and fail to provide
5 any legal authority for an “invalid debt” cause of action. The Cabaiois have failed to
6 allege a plausible cause of action for invalid debt. Therefore, the Court grants Aurora’s
7 motion to dismiss the Cabiaos’ invalid debt claim.

8 **2. FDCPA**

9 Foreclosure activities do not fall within the purview of the FDCPA. *See, e.g.,*
10 *Hulse v. Ocwen Federal Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002).

11 In this case, the Cabiaos allege that “Defendants failed to offer to validate the debt,
12 never sent a dunning letter, and took non-judicial action to collect the unsecured alleged
13 debt all of which violated the FDCPA.” Dkt. 43-1, ¶ 10(f). These allegations do not
14 support a claim for a violation of the FDCPA because the allegations relate to Aurora’s
15 foreclosure activities, which are not covered by the FDCRA. Therefore, the Court grants
16 Aurora’s motion to dismiss the Cabiaos’ FDCPA claim.

17 **3. FCRA**

18 The FCRA imposes certain duties on furnishers and credit reporting agencies
19 (“CRAs”). 15 U.S.C. § 1681s-2(a). Only some of those duties are subject to a private
20 right of action, specifically those duties imposed in § 1681s-2(b). *See* 15 U.S.C. §
21 1681s-2(d). Subsection (b) is only triggered when the furnisher receives notice of a
22 dispute from the CRA. *Id.* Thus, in order to maintain a private action for a violation of
23 the FCRA, as a threshold matter, a plaintiff must show that the furnisher received notice
24 from a CRA that a debt was disputed. *Id.; see also Krieg v. Allstate Financial Services*,
25 2007 WL 297065 (9th Cir. 2007) (plaintiff failed to state a claim when he did not allege
26 that he gave notice to a CRA or that furnisher failed to investigate the dispute).
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1 In this case, the Cabiaos allege that Aurora and Cal-Western “violated the [FCRA]
2 by permitting or requesting reporting of the alleged debt/obligation on Plaintiff’s credit
3 report.” Dkt. 43-1, ¶ 12. The Cabiaos, however, fail to allege that (1) they gave notice to
4 a CRA that they disputed credit information provided by either defendant, (2) either
5 defendant failed to investigate a dispute, or (3) either defendant continued to provide false
6 credit information to a CRA. Therefore the Court grants Aurora’s motion to dismiss the
7 Cabiaos’ FCRA claim.

8 **4. Recoupment and Setoff**

9 The Cabaiois allege that, under TILA, they have a right to recoupment and setoff
10 without time limitation. Dkt. 43-1, ¶ 13. Specifically, they allege that

11 the ancient maxim of law *lex anastasiana* provides that Defendant
12 AURORA, as a third person who allegedly purchased the Plaintiffs’
13 purported debt at a discount, or for less than its true or nominal value,
14 should not be permitted to recover from the debtor more than the price
AURORA paid.

15 *Id.* The Cabaiois have failed to show that this is a cognizable legal theory. Therefore, the
16 Court grants Aurora’s motion to dismiss the Cabiaos’ recoupment and setoff claim.

17 **C. Leave to Amend**

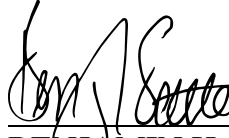
18 Generally, if a claim is based on a proper legal theory but fails to allege sufficient
19 facts, the plaintiff should be afforded the opportunity to amend the complaint before
20 dismissal. *Keniston*, 717 F.2d at 1300. However, if a claim is not based on a proper legal
21 theory, the claim should be dismissed. *Id.*

22 In this case, the Cabiaos have filed four different complaints and have had ample
23 opportunity to state a valid cause of action against the Defendants. They, however, have
24 failed to state any plausible cause of action and the Court finds that further amendments
25 would be futile. Therefore, the Court will not grant the Cabiaos an opportunity to amend
26 their complaint for the fourth time.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Aurora's motion to dismiss (Dkt. 37) is
3 **GRANTED** and the Cabaos' motion for leave to amend (Dkt. 43) and Aurora's motion
4 to dismiss (Dkt. 47) are **DENIED as moot**. The Clerk is directed to enter judgment for
5 Aurora and Cal-Western.

6 DATED this 5th day of October, 2011.

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9 BENJAMIN H. SETTLE
10 United States District Judge
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